

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 6, 2008

STATE OF TENNESSEE v. LAVIDO BUTLER

**Appeal from the Circuit Court for Maury County
No. 16107 Stella Hargrove, Judge**

No. M2006-02390-CCA-R3-CD - Filed July 7, 2008

The Defendant, Lavidio Butler, pled guilty to possession of less than .5 grams of cocaine with the intent to sell and to tampering with evidence, Class C felonies, but reserved the right to appeal a dispositive certified question of law pursuant to Tennessee Rule of Criminal Procedure 37(b)(2)(A): whether the trial court properly determined that the State was not required to release the name of the confidential informant mentioned in the affidavit accompanying the search warrant for the Defendant's residence which was executed prior to his arrest. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., J., and DAVID G. HAYES, SR. J., joined.

William C. Barnes, Jr., Columbia, Tennessee, for the appellant, Lavidio Butler.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; and Mike Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On June 2, 2005, Maury County police officer Mike Johnson requested a search warrant authorizing a search of the Defendant's residence. In the affidavit supporting the application for the warrant, Officer Johnson stated the following reasons for his belief that cocaine would be found on the Defendant's premises:

[Officer Johnson has] received information from a confidential reliable informant that has seen a quantity of cocaine on the above described premises in the

past 72 hours. The confidential reliable informant has given [Officer Johnson] information in the past that has resulted in the arrest and conviction of other illegal narcotic traffickers. Furthermore, the confidential reliable informant is familiar with the appearance of cocaine, [and] how it is sold and packaged for the purpose of resale.

The general sessions court issued the search warrant, and it was executed the following day. During the search, the police discovered crack cocaine and marijuana inside the Defendant's residence. Also during the search, officers observed the Defendant attempting to flush marijuana down a toilet. Based on this evidence, the Maury County Grand Jury indicted the Defendant for possession of more than .5 grams of cocaine with the intent to sell, tampering with evidence, and possession of marijuana with the intent to sell. Following the indictments, the Defendant filed a motion to discover the identity of the confidential informant cited in the affidavit; he also filed a related motion to suppress the evidence recovered during the search, and the trial court held a suppression hearing.

At the suppression hearing, the Defendant argued that his right to due process dictated that the State reveal the identity of the confidential informant because he could not test the credibility or reliability of the confidential informant without knowing his identity. More specifically, he contended that he could not attack the validity of the search warrant without the confidential informant's identity, and if the confidential informant was to testify for the State at trial, he would not be able to impeach his credibility. The State countered that the confidential informant's identity did not have to be revealed because the information supplied by the informant was used only to create probable cause for the issuance of the search warrant, and because the State was relying only on the evidence recovered during the search to prosecute the Defendant as charged in his indictments. The State further asserted that the informant's identity should not be released because the informant was not a witness to the crime, he did not participate in the crime, and he did not have any information that would be favorable to the Defendant. At the close of the hearing, the trial court denied the Defendant's motions, ruling that the State did not have to reveal the confidential informant's identity.

Subsequently, the Defendant entered into a plea agreement with the State. Pursuant to the agreement, the Defendant pled guilty to one count of possession of less than .5 grams of cocaine with the intent to sell, see Tennessee Code Annotated section 39-17-417, and one count of tampering with evidence, see Tennessee Code Annotated section 39-16-503(a)(1). Both offenses were Class C felonies, and under the agreement, he was to be sentenced as a Range I, standard offender to six years for the former and three years for the latter. The agreement also provided that the sentences would be served concurrently with one another but consecutively to a previously imposed sentence.¹ The Defendant was also to be fined \$2,000. The trial court held a guilty plea submission hearing before entering judgment on the Defendant's pleas.

¹ At the time of the instant offenses, the Defendant was on probation from a six-year sentence for an aggravated assault conviction. His probation was revoked following his arrest in this case.

At the submission hearing, the State set out what proof it was prepared to put forth if the Defendant's case went to trial. Each of the State's witnesses would have been law enforcement officers involved in either the search of the Defendant's residence or analysis of the evidence recovered there. These officers would testify that during the June 3, 2005 search, they encountered six men inside the Defendant's residence. When the officers came upon the Defendant, he and another man were in the bathroom "attempting to flush marijuana and possibly other drugs down the toilet." All of the individuals discovered inside the residence, except the Defendant, were detained outside during the course of the search; the Defendant remained inside the residence. The officers read the Defendant his Miranda rights,² and he indicated that he understood those rights. In the residence, officers found "a bag of marijuana out in the open, on a bed, and a bag of crack cocaine." After the drugs were discovered, the Defendant made incriminating statements indicating that the drugs belonged to him and that he "panicked" and attempted to flush a marijuana "blunt" down the toilet. Later testing by the Tennessee Bureau of Investigation revealed that the suspected drugs were in fact 19.5 grams of crack cocaine and 6.7 grams of marijuana. Lastly, the State added the following:

The State—that is essentially all of the State's proof we would present at trial. The State would not be seeking to introduce any proof of any facts that led up to the officers securing the search warrant. It's not the State's belief that the [confidential] informant was a witness to this crime of possession on June 3, and therefore the State would not deem that person a material witness, to the offense charged.

The trial court accepted the Defendant's guilty pleas and ordered the agreed-upon sentences, noting that pursuant to Tennessee Rule of Criminal Procedure 37(b)(2)(A), the pleas were conditional upon the submission of a dispositive certified question of law to the Tennessee Court of Criminal Appeals. The certified question was whether the trial court correctly ruled that the State was not required to reveal the identity of the confidential informant pursuant to the Defendant's requests. The trial court, the State, and the Defendant all agreed that the question was dispositive of the case because if the State was ordered to release the informant's identity, it would dismiss the charges rather than comply with the order.

The Defendant's certified question is now properly before this Court.

ANALYSIS

On appeal, the Defendant argues that this Court should hold that the trial court erred in ruling that the State did not have to release the name of the confidential informant. Generally, he asserts that he cannot put forth a defense without knowing the identity of the informant. The Defendant concedes that the State is not obligated to release the informant's identity unless the informant is a material or necessary witness, but he contends that this Court should rule that "it is impossible not to find that a confidential informant is a necessary person to the defense. [The] Defendant can in no

² See Miranda v. Arizona, 384 U.S. 436, 479 (1966).

way attack [the] credibility [of the informant] or the search warrant in and of itself, without knowing the identity of that individual.”

Usually, the State cannot be forced “to reveal the identity of an informant who has provided information leading to a defendant’s arrest and conviction.” State v. Vanderford, 980 S.W.2d 390, 395 (Tenn. Crim. App. 1997) (citing State v. Taylor, 763 S.W.2d 756, 760 (Tenn. Crim. App. 1988)) (other citations omitted). In House v. State, 44 S.W.3d 508 (Tenn. 2001), our supreme court explained the State’s limited privilege to withhold the identity of confidential informants as follows:

Tennessee common law recognizes the government’s privilege, subject to certain limitations, to withhold from the accused the identity of a confidential informant. See Simmons v. State, 198 Tenn. 587, 281 S.W.2d 487 (1955); see generally Neil P. Cohen, Sarah Y. Sheppard, Donald F. Paine, Tennessee Law of Evidence § 5.24 (4th ed. 2000). The privilege is based on public policy and “seeks to encourage citizens to assist in crime detection and prevention by giving information to law enforcement officials without unduly exposing themselves to the danger inherent in such laudable activity and to make possible their continued usefulness in future disclosures that the revelation of their identity would probably hamper and prevent.” Roberts v. State, 489 S.W.2d 263, 264 (Tenn. Crim. App. 1972).

House, 44 S.W.3d at 512; see also State v. Brandon Keith Ostein, No. M2007-00925-CCA-R9-CO, 2008 WL 2229172, at *3 (Tenn. Crim. App., Nashville, May 29, 2008). Defendants do not have a constitutional right to compel the disclosure of a confidential informant’s identity. House, 44 S.W.3d at 512 (citing Wallis v. State, 417 S.W.2d 781, 784 (1967)).

There is no black and white rule stating when the State must reveal the identity of a confidential informant. Vanderford, 980 S.W.2d at 396 (citing Roviaro v. United States, 353 U.S. 53, 62 (1957)) (other citations omitted). Rather, whether the State should be required to release the identity of a confidential informant is left to the discretion of the trial court, to be decided on a case by case basis, “taking into consideration the facts peculiar to each case.” Id. (citing Wallis, 417 S.W.2d at 784). However, this Court has set out specified factual circumstances which allow a defendant to discover a confidential informant’s identity:

The state is required to divulge the identity of a confidential informant to the defendant when: (a) disclosure would be relevant and helpful to the defendant in presenting his defense and is essential to a fair trial; (b) the informant was a participant in the crime; (c) the informant was a witness to the crime; or (d) the informant has knowledge which is favorable to the defendant.

Id. at 397 (internal citations omitted). A defendant has the burden to establish the materiality of the confidential informant’s identity to his defense by proving one of these circumstances by a

preponderance of the evidence, and when a defendant fails to do so, the State is not required to reveal the informant's identity. See id. (citations omitted).

In this case, the Defendant has not demonstrated by a preponderance of the evidence that any of the circumstances articulated in Vanderford apply. Based on our review of the record, it is clear that the confidential informant's role was limited to the establishment of probable cause for the issuance of the search warrant. It is also clear that the Defendant's indictments were based on evidence obtained during the search, and the State does not need any testimony or information from the informant to make its case against the Defendant. Accordingly, we conclude that the trial court did not err or abuse its discretion in ruling that the State was not required to disclose the informant's identity. See State v. Ostein, 2008 WL 2229172, at *3–4 (employing the same reasoning in an analogous case and ruling that “a challenge to the validity of a search warrant is not a proper reason for disclosing the identity of a confidential informant”) (citing State v. Ash, 729 S.W.2d 275, 278 (Tenn. Crim. App. 1978)) (other citations omitted).

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE